Supreme Court, U.S.
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No. 95-75

In the Supreme Court of the United States

OCTOBER TERM, 1995

AIDAN ALASTAIR ROBERTSON-AIKMAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the Board of Immigration Appeals erred in concluding that petitioner was deportable under Section 241(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2)(A)(ii) (Supp. IV 1992), which provides that an alien is deportable if he is convicted of two or more crimes involving moral turpitude, "not arising out of a single scheme of criminal misconduct."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the judgment is noted at 53 F.3d 1281 (Table). The decisions of the Board of Immigration Appeals (Pet. App. 5-13) and the immigration judge (Pet. App. 14-18) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1995. The petition for a writ of certiorari was filed on July 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of the United Kingdom, entered the United States in 1980 as a non-immigrant treaty investor. Although he was authorized to remain in the United States for only one year, he remained in this country after that year expired. Pet. App. 6, 15.

In 1985, petitioner sought financing to develop real estate in Texas and to operate a convenience store. On two occasions he applied to the Bank of the Southwest for a line of credit, using fictitious social security numbers. Pet. App. 9; Admin. Rec. 68-69, 74. Those fraudulent acts took place on or about February 18, 1985, and June 18, 1985. Pet. App. 9. When the bank discovered the fraud, it discontinued petitioner's line of credit. Petitioner was ultimately convicted on two counts of falsely representing a number to be his social security number with the purpose of obtaining things of value from another, in violation of 42 U.S.C. 408(g)(2), and one count of bank fraud, in violation of 18 U.S.C. 1014. Admin. Rec. 93-96.

On March 11, 1986, after the discontinuance of his line of credit, petitioner attempted to pay a bill for convenience store supplies with a check for $1800.02 that he knew would be dishonored for insufficient funds. Pet. App. 17; Admin. Rec. 71, 77, 92. That act led to petitioner's conviction in a Texas court on April 21, 1987 for theft, in violation of Section 31.03(e)(4)(A) of the Texas Penal Code. Admin. Rec. 88-90.

2. The Immigration and Naturalization Service (INS) brought deportation proceedings against petitioner, charging him with deportability under Section

241(a)(1)(B) of the Immigration and Nationality Act (Act), 8 U.S.C. 1251(a)(1)(B) (Supp. IV 1992), as a non-immigrant who had overstayed his visa.* Admin. Rec. 124-132. The INS also charged petitioner with deportability under Section 241(a)(2)(A)(ii) of the Act, 8 U.S.C. 1251(a)(2)(A)(ii) (Supp. IV 1992), which provides as follows:

> Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

Petitioner admitted deportability under Section 241(a)(1)(B) based on the overstay (Admin. Rec. 42-43), but denied deportability under Section 241(a)(2)(A)(ii), arguing that all his federal and state convictions arose from "a single scheme of criminal misconduct" and therefore did not provide the predicate for deportation under that provision. Admin. Rec. 57-59. Petitioner also sought a continuance of the deportation proceedings, but he did not claim entitlement to relief from deportation under the Act. *Id.* at 41, 50-51, 54, 65.

The immigration judge (IJ) found that petitioner was deportable under both Section 241(a)(1)(B) and Section 241(a)(2)(A)(ii), and ordered that he be deported to the United Kingdom. Pet. App. 14-18; see App., *infra*, 1a (memorandum of oral decision finding

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* Section 241(a)(1)(B) of the Act provides, in pertinent part, that "[a]ny alien who * * * is in the United States in violation of this chapter or any other law of the United States is deportable." 8 U.S.C. 1251(a)(1)(B) (Supp. IV 1992).

petitioner deportable under both Sections). With regard to the charge based on petitioner's criminal convictions, the IJ "[found] it clear from the [state] indictment presented to which the [petitioner] has plead[ed] guilty that at the time he wrote checks on the account he knew that they would be returned not sufficient funds," because the bank had discontinued his credit. Pet. App. 17. The IJ therefore found "any relationship between the establishment of the [bank] account and the credit that it contained * * * [to be] sufficiently removed from [petitioner's] further action in writing checks * * * to sustain the charge of deportability as one convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct." *Ibid.*

3. The Board of Immigration Appeals (BIA) affirmed the decision of the immigration judge. Pet. App. 5-13. The BIA observed that neither the text of Section 241(a)(2)(A)(ii) nor its legislative history defines the phrase "single scheme of criminal misconduct." Pet. App. 7-10. The BIA emphasized that it had "always interpreted" the statute to mean that, "when an alien has performed an act, which, in and of itself, constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct." *Id.* at 7-8 (citing, *inter alia*, *Matter of Adetiba*, Int. Dec. 3177 (B.I.A. 1992), and *Matter of D—*, 5 I. & N. Dec. 728 (B.I.A. 1954)). "Under this analysis," the BIA continued, "there would exist a single scheme of criminal misconduct where one crime constitutes a lesser offense of another, or where the two crimes flow from and are the natural consequences of a single act of criminal

misconduct." Pet. App. 8. The BIA acknowledged that "some circuit courts have adopted a more expansive view of what constitutes a single scheme," but it noted that the Fifth Circuit, where this case arose, has upheld its construction of Section 241(a)(2)(A)(ii). Pet. App. 8 (citing *Iredia* v. *INS*, 981 F.2d 847 (5th Cir.), cert. denied, 114 S. Ct. 203 (1993)).

Applying those principles to the instant case, the BIA concluded that petitioner's crimes were "separate and distinct" and did not arise out of a single scheme. Pet. App. 9. The BIA noted that petitioner "had already accomplished his goal of [the first crime], obtaining the financing for the land development and store," by the time his credit was terminated. Moreover, the BIA concluded, petitioner's "second offense is not a lesser included offense of the first, nor did it any way further the criminal enterprise of the first." *Ibid.* The BIA noted that petitioner "may have felt it necessary to write a bad check because he lost credit with the bank, but this act, 9 months after his previous fraudulent acts, was a separate criminal scheme. The bad check was in no way necessary to obtain the original financing." *Ibid.*

4. Petitioner sought review of his deportation order in the Fifth Circuit. He contended that the BIA's finding of deportability under Section 241(a)(2)(A)(ii) was not supported by substantial evidence, because his crimes resulted from a single scheme to use or attempt to use a single line of credit from the same financial institution. Pet. C.A. Br. 5-6. Petitioner did not argue that either the BIA's decision in *Adetiba* or the Fifth Circuit's precedent in *Iredia* was wrongly decided; rather, he contended that the BIA incorrectly applied *Adetiba* to his case

and that this case is distinguishable on its facts from *Iredia*. *Ibid.* In an unpublished decision, the Fifth Circuit sustained the BIA's decision, concluding that it was supported by substantial evidence. Pet. App. 1-2.

ARGUMENT

Petitioner correctly notes (Pet. 5-6) that there is disagreement among the courts of appeals as to the correct scope of a "single scheme of criminal misconduct," as that term is used in Section 241(a)(2)(A)(ii) of the Act. Compare *Akindemowo* v. *INS*, 61 F.3d 282 (4th Cir. 1995) (upholding BIA's interpretation); *Balogun* v. *INS*, 31 F.3d 8 (1st Cir. 1994) (same); *Iredia* v. *INS*, 981 F.2d 847 (5th Cir.) (same), cert. denied, 114 S. Ct. 203 (1993); and *Nguyen* v. *INS*, 991 F.2d 621 (10th Cir. 1993) (same), with *Gonzalez-Sandoval* v. *INS*, 910 F.2d 614, 616 (9th Cir. 1990) (disagreeing with First Circuit, and holding that offenses need not "take place at one time" to constitute a "single scheme"); *Nason* v. *INS*, 394 F.2d 223 (2d Cir.), cert. denied, 393 U.S. 830 (1968); and *Sawkow* v. *INS*, 314 F.2d 34 (3d Cir. 1963). That disagreement, however, does not provide a reason for this Court's review of the present case. First, petitioner conceded, and the IJ found, that petitioner is independently deportable on another ground. Second, even the courts of appeals that have disagreed with the BIA's construction of a "single scheme of criminal misconduct" and have applied a broader standard would have upheld the deportation order in this case (apart from the independent ground). Therefore, resolution of the conflict would not affect the outcome of this case.

1. Even if this Court were to agree with petitioner that the BIA erred in finding him deportable under Section 241(a)(2)(A)(ii) of the Act, he still would be deportable under Section 241(a)(1)(B) for having overstayed his nonimmigrant visa. The IJ found him deportable under Section 241(a)(1)(B), see App., *infra*, 1a, and petitioner conceded deportability on that ground at his deportation hearing. Admin. Rec. 42-43. Although the IJ's memorandum of oral decision, finding petitioner deportable under Section 241(a)(1)(B), states that it is "intended solely for the convenience of the parties," and that the transcribed and signed oral decision (which did not refer to deportation under Section 241(a)(1)(B)) would be the official decision and order in the case, it is clear that petitioner is deportable for having overstayed his visa, and that the result would be the same if the matter were resubmitted to the IJ for clarification of the decision on that ground. Nor did petitioner contend that he was eligible for statutory or discretionary relief from deportation. This case therefore presents an inappropriate vehicle for consideration by this Court of the scope of Section 241(a)(2)(A)(ii).

2. In addition, review is not warranted because petitioner's attempt to invoke the "single scheme" exception to deportability under Section 241(a)(2)(A)(ii) would fail even in those circuits that have read the statutory language somewhat more broadly than have the Fifth Circuit and the BIA. All three circuits that have articulated a broader interpretation have nonetheless stated that the passage of a substantial period of time between the commission of two offenses is sufficient to establish that those offenses are not part of a "single scheme"; they have held crimes to be part of a single scheme only when

the offenses were so closely linked in time that they probably were planned at the same time. If petitioner's case had arisen in those circuits, it is very likely that those courts of appeals would have ruled that the passage of time between petitioner's use of false social security numbers to obtain credit and his subsequent act of theft in writing a bad check was sufficient to uphold the BIA's conclusion that the two acts were not part of a single scheme.

The Ninth Circuit has held that crimes committed on different dates are presumed to be separate and distinct offenses not covered by the "single scheme" exception, unless the alien demonstrates that "the crimes were executed according to [a] considered plan." *Leon-Hernandez* v. *INS*, 926 F.2d 902, 905 (1991). The Ninth Circuit has also stated that, "[i]n the absence of all evidence to the contrary, completed crimes committed on differing dates or in differing places are considered separate and different crimes, and support separate charges." *Id.* at 904. Thus, in *Leon-Hernandez*, the Ninth Circuit rejected an alien's claim that his convictions on two counts of oral copulation with a minor fell within the "single scheme" exception of Section 241(a)(2)(A)(ii), notwithstanding that the criminal acts resulted from the alien's ongoing, unlawful relationship with the minor. 926 F.2d at 904-905. Because the alien had not definitely intended to commit the second sexual offense when he committed the first, the Ninth Circuit held that the BIA's finding of deportability was reasonable. *Id.* at 905. Cf. *Gonzalez-Sandoval*, *supra* (finding that two robberies committed two days apart against same bank constituted a "single scheme").

Decisions of the Second and Third Circuits are to the same effect. In *Nason*, the Second Circuit upheld the BIA's conclusion that "two periods of mail fraud activity separated by an interval of over nine months" did not constitute a single scheme of criminal misconduct. 394 F.2d at 225. The court observed that, notwithstanding "the basic similarity between the two crimes" (*ibid.*), the two episodes of criminal activity were not part of the same scheme because the "interlude between the first and second periods of criminal activity was not anticipated * * * [and] [p]etitioner terminated his first period of criminal activity simply because he had acquired all he wanted." *Id.* at 226. Here, too, petitioner's second criminal episode, the writing of a bad check, was not anticipated at the beginning; it was undertaken only after petitioner's first criminal action, the fraudulent securing of a line of credit, came to an end, and it constituted a new criminal undertaking. As the Second Circuit remarked, "Congress intended [the] restriction to operate so that a one-time alien offender would be afforded a second chance before he could be deported. * * * Congress meant to give the alien a second chance, not to spare the recidivist." *Id.* at 227.

By contrast, the Third Circuit concluded that "the receipt of a stolen motor vehicle on July 17, 1958, and the theft of another vehicle belonging to a different person on the following day" in the same city constituted a single scheme of criminal misconduct within the meaning of Section 241(a)(2)(A)(ii). *Sawkow*, 314 F.2d at 38. The court acknowledged that "the inference to be drawn from different crimes committed at different times against different persons is that they were separate and distinct unless

there is evidence to the contrary," but it found that inference inapplicable to the case before it, because, "[f]or all we know * * * these crimes may have been perpetrated within a few minutes of each other." *Ibid.* Because this case does involve "different crimes committed at different times against different persons," the Third Circuit would have upheld the BIA's conclusion that petitioner was deportable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1995

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge
Dallas, Texas

In the Matter of:	)	File A28 394 538
	)	
	)	
Aidan Alastair	)	
Robertson-Aikman	)	
	)	
	)	
	)	In Deportation
Respondent(s)	)	Proceedings

Memorandum of Oral Decision

This is a summary of the Oral Decision and Order issued today intended solely for the convenience of the parties. In the event of review the transcribed and signed Oral Decision is the official decision and order in this case.

Respondent was/found deportable under Section 241(a)(1)(B) & § 241(a)(2)(A)(ii) of the Immigration and Nationality Act of 1952 as amended.

Respondent applied for the relief of _____ which was granted/denied.

Respondent applied for the alternative relief of_____ which was granted/denied/moot.

Respondent applied for the alternative relief of_____ which was granted/denied/moot.

Respondent applied for the alternative relief of_____ which was granted/denied/moot.

Respondent was granted Voluntary Departure on or before _____ with an alternative Order of Deportation to _____ or _____

Respondent was ordered deported to the United Kingdom or _____

Appeal was /reserved by /Respondent. Any appeal is due by February 10, 1994

DATE: January 31, 1994

PLACE: Dallas, Texas

/s/ Gary Burkholder
Gary Burkholder
Immigration Judge